IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/03/2004

CORAM

THE HON'BLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.147 of 1993

R.Prabakaran .. Appellant

-Vs-

1. Ambujathammal
2. N.Sivaraj
3. P.Pakkiriswamy .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree in A.S.No.173 of 1991 dated 21.7.1991 on the file of the District Judge, Nagapattinam confirming the judgment and decree in O.S.No.182 of 19 ated 28.2.1991 on the file of the District Munsif, Tiruvarur.

!For Appellant : Mr.P.Gopalan

^For Respondents : No appearance

:JUDGMENT

Aggrieved over the refusal of the relief in respect of easementary right by both the Courts below, the plaintiff has brought forth this second appeal.
2. The plaintiff filed the suit seeking for a declaration that there is a pathway in the properties of the defendants, shown as C,D,F,F1, C,E,F, M, N, F1, G, H, I, J, K, L1, M in the plaint plan to reach his lands called Chekkadi Kollai, for a manda injunction for the removal of the obstructions made therein, for a declaration of his right to draw water from the well shown in the second item of property and for permanent injunction that the defendants should be restrained from interfering with his right. It was alleged by the plaintiff that the suit property originally belonged to one Ramasamy Chettiar, and on his death, it devolved upon his son Chidambaram Chettiar; that on his death, his three sons, Ramasamy Chettiar, Kandasamy Chettiar and Nat araja Chettiar made a division of their family properties on 11.3.1930 under Ex.A6; that in that partition deed, a passage with a width of 5 feet was left for the use; that the said passage has all along been used; that even in the partition deed, it has been specifically recited that the father and three sons should have the use of the said property as commonly left passage; that in that deed of partition, some of the properties in 'A' Schedule property were in the hands of the first defendant by way o f

purchase, while 'B' Schedule property was allotted to Ramasamy Chettiar, 'C' Schedule to Kandasamy Chettiar and 'D' Schedule to Nataraja Chettiar; that the said Ramasamy Chettiar conveyed all the properties except the said Chekkadi Kollai; that the thi rd defendant is the son of the said Nataraja Chettiar; that the plaintiff purchased the said Chekkadi Kollai from one Renganatha Iyengar, the predecessor-in-title, by a sale deed dated 17.1.1983; that even during the life time of Chidambaram Chettiar and his sons and also during the enjoyment of the property by Renganatha Iyengar, the said passage referred to above, was being used to reach the main road; that there is no other alternative pathway; that as an easement of necessity, the said pathway has b een put to long user; that while so, the first defendant has raised the obstructions at CD and FF1 points; that the second and third defendants have also obstructed the said passage at C, E, F, G, H, I, J, K, L,M,N,T, and hence, there arose a necessity f or filing the suit for declaration and mandatory injunction also in that regard; that insofar as the second item of property, the well was being used by the plaintiff all along, and thus, he wanted to have a declaration of his right and permanent injunct ion restraining the defendants not to interfere in the same.

3. The suit was resisted by the defendants inter alia stating that there was no passage as put forth in the plaint, at any point of time; that the passage was never used by either Chidambaram Chettiar or his sons or Renganatha Chettiar; that even in sale deed, executed in favour of Renganatha Chettiar, there is no mention of this passage; that apart from that, there was an alternative pathway, and hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and refused the reliefs in respect of the first item, while it granted the reliefs in respect of the second item. Aggrieved, the plaintiff took it on appeal in respect of the denial of reliefs of declaration and mandatory injunction also in respect of the pathway. The first appellate Court on enquiry dismissed the appeal, affirming the judgment of the trial Court. The defendants have not preferred any appeal challenging the grant of th e relief in respect of the second item, and thus, it has become final. Aggrieved by the judgment of both the Courts below, denying the reliefs in respect of the first item, the plaintiff has brought forth this second appeal.

5. At the time of admission, the following substantial question of law was formulated by this Court:

"Inasmuch as the right of pathway is specifically reserved in the document Ex.A6 dated 11.8.1930, are the courts below right in dismissing the suit without any legal evidence regarding the secessation of the easementary right?"

6. This Court heard the learned Counsel for the appellant. There was no representation for the respondents, despite service of notice.

7. The plaintiff sought for the relief of declaration in respect of easement of necessity of a passage, which is admittedly situated in the property of the defendants and shown in the plaint plan as C,D,F,F1, C,E,F, M, N, F1, G, H, I, J, K, L1, M. om the available materials, it could be well seen that the suit property originally belonged to one Ramasamy Chettiar and after him, devolved upon his son Chidambaram Chettiar, and the said Chidambaram Chettiar and his sons entered into a family partitio n on 11.3.1930 as found under Ex.A6 partition deed. As rightly pointed out by the learned Counsel for the appellant, the passage referred to in the plaint plan

and in respect of which the plaintiff has sought for the declaration of his easementary right , was set apart, and the same was not partitioned between the parties. It has been specifically mentioned in Ex.A6 that the said passage is left for the use of the parties. From the available evidence, it would be quite clear that the plaintiff has pur chased the property called Chekkadi Kollai, which is situated in Survey No.1894, from one Renganatha Iyengar by a sale deed dated 17.1.1983 under Ex.A1. The said Renganatha Iyengar has purchased this property under two sale deeds Ex.A2 dated 9.1.1943 an d Ex.A3 dated 11.1.1943 from Ramasamy Chettiar and Nataraja Chettiar respectively. It is true that the passage in respect of which the plaintiffs seeks the reliefs, was not referred to in both the sale deeds. Both the Courts below have pointed out that had it been true that a passage was in existence and was being used by Chidambaram Chettiar and his sons, a person like Renganatha Iyengar, who was a practising lawyer, would not have allowed the parties not to make mention of the said passage in the sa le deeds, and even assuming that such a passage was in existence, the right of easement has got extinguished due to non-enjoyment, and hence, the plaintiff cannot claim the said reliefs. This Court is of the considered opinion that the view taken by bot h the Courts was erroneous. The earlier document namely Ex.A6, a partition deed among the said Chidambaram Chettiar and his three sons, would clearly refer to the passage in question, and the same has also been set apart, but was not partitioned between the parties. It is also clearly mentioned therein that the passage must be used by all the parties. The said Renganatha Iyengar has purchased 6 cents from one of the sons and the other 6 cents from the other sons, and thus, he purchased a total extent of 12 cents from them under Exs.A2 and A3. Now, the plaintiff has purchased the entire property from the said Renganatha Iyengar.

8. As could be seen from the plaint, in order to reach the property namely Chekkadi Kollai, which belonged to the plaintiff, from the Iyyanar Koil Street, situated on the north extreme, the passage in question is the only way, and no other alternati ay is available. But, both the Courts have pointed out that there is a channel situated on the south of Chekkadi Kollai, and the plaintiff has been using the said channel as a pathway all along. This Court is unable to see how a channel could be used a s a pathway. It is clear from the plaint averments that without the said pathway, the plaintiff could not reach the main street. From the available materials, it could be seen that no Advocate Commissioner was appointed to find out whether there is any alternative pathway available. Sec.47 of the Indian Easements Act reads as follows:

"47. Extinction by non-enjoyment:

A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on whi ch it was last enjoyed by any person as dominant owner.

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877 (3 of 1877), a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other items, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that dominant owner was not aware of its existence, or that he e njoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section-

(a) where the cessation is in pursuance of a contract between the dominant and servient owners;

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(c) where the easement is necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement."
In view of the provisions enshrined under Sec.47 of the Indian Easements Act, there cannot be any extinguishment of easement, which has been used by way of necessity. It is true that in the instant case, in Exs.A2 and A3, there was no mention of the pas sage in question. It remains to be stated that the non-mention of the easement of the pathway in the deed and of the existence of the easement of way in question cannot be said to be a material circumstance so as to delimit it in any way the vested righ t in the plaintiff, since it would be quite evident from the partition deed entered into between the parties under Ex.A6 that the pathway was set apart.
9. Now, the only point, as pointed out by the Courts below, is whether there is any alternative pathway. In the instant case, the alternative pathway, according to the lower Courts, is a channel. The channel cannot be used as an alternative pathwa From the evidence and in particular Ex.A6 partition deed, it would be clear that the passage was set apart, Both the Courts have been carried away that since Exs.A2 and A3 sale deeds in favour of Renganatha Iyengar, did not make mention of this, it has become extinguished, which was thoroughly erroneous, in view of the legal position and the provisions enshrined under Sec.47 of the Easements Act. In such circumstances, this Court is of the considered view that there could not be any extinguishment of easement of necessity, merely because of the reason of

non-mention of the same in the documents or an omission made, and hence, it is a right already vested in the party. The Court is of the firm view that the relief of declaration in respect of item 1 has to be granted along with the mandatory injunction asked for, and the judgments of both the lower Courts have got to be necessarily set aside.

10. In the result, this second appeal is allowed, setting aside the judgments and decrees of the lower Courts in the above lines. The plaintiff is given a decree for declaration and mandatory injunction in respect of item 1. The parties shall bear ir costs.

Index: yes
Internet: yes

To:

1. The District Judge
Nagapattinam
2. The District Munsif
Tiruvarur
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/

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